

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of:)
)
Amendment of Parts 21 and 74 of the Commission's) MM Docket No. 94-131
Rule With Regard to Filing Procedures in the)
Multipoint Distribution Service and in the)
Instructional Television Fixed Service)
)
And)
)
Implementation of Section 309(j) of the) PP Docket No. 93-253
Communications Act - Competitive Bidding)

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**NYNEX COMMENTS RE
PETITIONS FOR RECONSIDERATION**

NYNEX Corporation

Donald C. Rowe
1111 Westchester Avenue
White Plains, NY 10604
(914) 644-6993

Its Attorney

Dated: September 13, 1995

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SUMMARY

NYNEX Corporation, on behalf of its subsidiaries, supports the Commission's determination in this proceeding to aid in the development of wireless cable by establishing fair and reasonable terms for the use of available MDS and ITFS spectrum. NYNEX further supports the auction approach adopted by the Commission and its plan to begin competitive bidding in November 1995.

Several parties have filed Petitions For Reconsideration suggesting modifications and clarifications of the Commission's Order. NYNEX urges the adoption of proposals made by the Wireless Cable Association, Inc., Pacific Telesis and Bell Atlantic which would add certainty for the prospective bidders and, therefore, value to the auction process. Conversely, we urge the rejection of the proposal of John D. Pellegrin, Chtd., to the extent the additional time he requests for incumbent applications would either necessitate the postponement of the auction or cause added uncertainty for bidders.

Similarly, NYNEX supports the proposals of United States Wireless Cable that the Commission: (1) declare that MDS providers may employ digital technology in their delivery of service; and (2) grant a pending Application For Review that will ensure the continued strength of the ITFS/MDS relationship. Whether here or in other proceedings, the Commission should grant the requested relief.

Finally, NYNEX opposes the position advanced by A/B Financial that the Commission lacks the legal authority to proceed with the MDS auctions as planned.

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To: The Commission

**NYNEX COMMENTS RE
PETITIONS FOR RECONSIDERATION**

NYNEX Corporation, on behalf of its subsidiaries (collectively 'NYNEX'), hereby submits its Comments Re Petitions For Reconsideration filed by various entities in the above-referenced proceedings. Overall, NYNEX supports the Commission's decisions in the Report and Order¹ establishing pro-competitive terms and conditions to govern the auction of spectrum and MDS operations thereafter.² Nevertheless, several

¹ Report and Order, MM Docket No. 94-131 and PP Docket No. 93-253, FCC 95-230, (hereafter "MDS Auction Order"), released June 30, 1995.

² The Commission has now determined that the competitive auction of MDS Spectrum will commence on November 13, 1995, with applications of interested entities to be filed by October 10, 1995.

petitioners have offered proposals to further clarify the rights to be offered in the auction which, if timely adopted by the Commission, would serve to strengthen the auction process by increasing the certainty of the rights at issue. These proposals will serve the public interest by enhancing the commitment of the prospective bidders and adding value to the auction process.³ Conversely, another petitioner asks for additional time for incumbents to file applications to change their systems. This proposal would either require a postponement in the auction or add uncertainty for bidders, and should be denied. Finally, the Commission should reject the position advanced by another petitioner that challenges the Commission's authority to proceed with the auctions as planned. Each of these proposals is addressed below.

I. THE COMMISSION SHOULD ADOPT CERTAIN PROPOSALS MADE BY WCAI, PACIFIC TELESIS AND BELL ATLANTIC

The Wireless Cable Association International, Inc. ("WCAI") observes that the Commission may have left uncertain the rights of the initial BTA authorization holder after the five-year buildout period. WCAI proposes that the Commission clarify that the BTA authorization holder -- once having met the build-out requirement -- has: (1) the right to add new facilities within its service area; and (2) an authorization term of ten

³ NYNEX's interest in MDS spectrum and operations is a matter of public record. NYNEX Corporation and Bell Atlantic Corporation ("Bell Atlantic") recently announced a minority investment in CAI Wireless Systems, Inc., which includes an option to lease capacity on certain of CAI's wireless transmission systems to provide video programming services.

years, with a renewal expectancy similar to that awarded successful PCS and GWCS auction entities.⁴

WCAI properly points out that the effect of these clarifications would be to incent and enable the BTA authorization holder to enhance service beyond the specific build-out requirements. Their manifest public interest benefits are backstopped by the Commission's retention of authority to partition away unserved areas at the five-year checkpoint.⁵ NYNEX regards these proposals as entirely consistent with the Commission's procompetitive purpose in these proceedings, and supports their adoption.⁶

Pacific Telesis Enterprise Group and Cross Country Wireless, Inc. (collectively "Pacific Telesis") urge the Commission to take the necessary actions to enable potential bidders to assess all existing and proposed ITFS and MDS stations filed prior to the commencement of the auction and MDS applications filed prior to the September [15th] deadline."⁷ As Pacific Telesis properly points out, the certainty required by bidders can only be attained: (1) if existing ITFS and MDS applications are timely available for review before the bidding process; and (2) all MDS and ITFS incumbent licenses are

⁴ WCAI at pp. 11-15. WCAI's concern regarding the ten-year term may be overly cautious. It appears that the Commission has determined that a ten-year term is appropriate in the text of the MDS Auction Order (para. 39).

⁵ MDS Auction Order at para. 43.

⁶ WCAI also points out that, as a technical matter, the Commission should amend 47 C.F.R. §§ 74.990 and 74.991 to make clear that it will not accept competing applications for MDS station licenses within the BTA authorization area during the five-year buildout. WCAI at 12, n.23. This proposal should also be adopted as a reasonable approach to conforming the Commission's other regulations to its decision to adopt the five-year buildout in this proceeding (47 C.F.R. § 21.930(b)(1)).

⁷ Pacific Telesis at 4, and n.5

foreclosed from filing modification applications after the prospective service provider has bid for BTA authorization.⁸ The merits of the former proposal are self-evident. They have apparently already been accommodated in the Commission's proposed bidding schedule. Adoption of the second proposal is equally as important. Service areas within a BTA that are apparently available from a review of licenses and applications should not be compromised by the subsequent actions of incumbents. Pacific Telesis properly observes that its proposal is the logical extension of the BTA authorization concept adopted by the Commission. That is, incumbents must be required now to respect service rights in the whole BTA, just as they have previously been asked to respect the specific facilities of other licensees.⁹ As it notes;

“[t] his approach is part of a fair and balanced accommodation of the interests of existing licensees and of those who will have to bid for the right to serve areas within BTAs that up to now have not received wireless cable service (MDS or ITFS) or have received less than full service.”¹⁰ (emphasis supplied)

NYNEX supports this balanced accommodation of interests. Conversely, the Commission should reject the proposal made by John D. Pellegrin, Chtd., to the extent it

⁸ Id. at pp. 4-8.

⁹ Pacific Telesis at p. 5, n.6.

¹⁰ Id. at 5. Conversely, this balanced accommodation of interests also suggests that the Commission reconsider its grant of a right-of-first refusal to the BTA authorization holder over future leases granted by ITFS licensees to other MDS providers. As Pacific Telesis and many other petitioners have argued, there is a relationship between the ITFS licensee and the leased MDS service provider which should be made on a voluntary, rather than a compelled basis. Prospective bidders can factor this revision to the MDS Auction Order into their economic analyses if the Commission acts promptly.

argues that the deadline for applications of incumbents extend into the auction period under a principle of caveat emptor.¹¹ It is fair and reasonable for the Commission to ask competitive bidders to assume some risk as to their assessment of the outcome of known incumbent applications. However, it would be unfair, unreasonable and unnecessary to extend that risk to applications not yet made, as would occur if the relief requested by Mr. Pellegrin is accepted without a concomitant delay in the Commission's announced auction plans. Bidder interest and auction value will only be diminished if bidders are asked to buy "a pig in a poke." Accordingly, both the required certainty and expedition support the adoption of the Pacific Telesis approach.

Bell Atlantic proposes the reconsideration and modification of three aspects of the MDS Auction Order. With respect to the proposed rules, it observes that several minor modifications of the proposed rules are necessary to ensure that the protected service areas of MMDS channels and leased airtime in ITFS frequencies are given consistent regulatory treatment. Specifically, Bell Atlantic argues that the proposed rules fail to protect leased ITFS stations for a full 35-mile circle into an adjacent BTA in circumstances where a MMDS station would be protected.¹² It proposes that the Commission "require the BTA authorization holder -- which are in all instances the newcomers -- to provide interference protection for the 35-mile circular area of existing

¹¹ Petition For Reconsideration, Docket No. 90-54 and Docket No. 80-113, at pp. 4-6.

¹² Bell Atlantic at pp. 13-15.

MMDS stations and leased airtime on ITFS stations.”¹³ This proposal advances the public interest by enhancing the economic feasibility of a competitive provider building a wireless cable system with a combination of MDS and ITFS frequencies. It further advances the provision of ITFS to the public by strengthening the value of the existing ITFS/MDS relationship.¹⁴

Bell Atlantic also proposes that the Commission establish a flexible regulatory scheme more supportive of the rapid introduction and buildout of MDS service. First, it suggests that the Commission revise its proposed rules to provide for a blanket BTA authorization once the initial “long-form” application has been approved.¹⁵ Thereafter, the BTA authorized service provider would “be allowed to set up transmitter sites anywhere within the geographic service area without seeking prior approval for each of these sites, as long as installation would not increase the potential for interference to existing stations described in the BTA initial interference analysis.”¹⁶ Without repeating the proposal in its entirety, NYNEX observes that it clearly furthers commercial and regulatory efficiency. Second, Bell Atlantic proposes that the BTA authorization holders be permitted to extend the coverage of an ITFS station by placing transmitters out to the boundaries of the BTA.¹⁷ Given the conditions also proposed by Bell Atlantic to protect

¹³ *Id.* at p. 14.

¹⁴ WCAI at pp. 20-22.

¹⁵ Bell Atlantic at pp. 3-10.

¹⁶ *Id.* at p. 8.

¹⁷ Bell Atlantic at pp. 10-13. Bell Atlantic’s proposal is presented most concretely where the BTA authorized entity also leases ITFS station airtime with transmitter sites within the boundaries of the

the potentially affected ITFS interests, the proposal appears to provide for maximum utilization of available spectrum consistent with the balanced approach discussed above.

Both of these proposals should be adopted by the Commission.

II. USWC PROPOSES TWO POLICY CLARIFICATIONS WHICH SHOULD BE ISSUED PROMPTLY

United States Wireless Cable, Inc. ("USWC") has proposed two important clarifications of the MDS Auction Order.¹⁸ Both proposals involve Commission actions in other proceedings, but it is unclear procedurally in which proceeding(s) the Commission may choose to address USWC's points. Nevertheless, the importance of clarifying these issues quickly -- and in the manner proposed by USWC -- mandates that NYNEX address them here.

First, USWC proposes that the Commission make clear that MDS spectrum may be used for digital wireless service. USWC seeks such declaration here, although it acknowledges that a more specific rulemaking proposal has been made in a Petition For Declaratory Ruling, filed July 13, 1995 (DA 95-1854). NYNEX does not believe that the Commission intends its rules to limit the deployment of technological advancements such as digitalization. Nevertheless, certain specific aspects of the current rules assume analog

BTA. While the proposal is clearly persuasive in this context, it is also applicable to areas where ITFS frequencies lie "fallow" because there are no ITFS licenses from which to lease airtime. Id. at 12, n.7.

¹⁸ USWC at pp. 1,2 and 4-5. USWC also proposes that the "right-of-first refusal" granted the BTA authorization holder be reversed. NYNEX agrees, as discussed supra...

service. Accordingly, the Commission's timely declaration that MDS providers may use digital technology is imperative to ensure the development of a competitive wireless cable service. Without the opportunity to deliver the channels and services which digitalization will enable, wireless cable service will be competitively impaired and possibly disabled. Whether in this proceeding or in response to the Petition For Declaratory Ruling, the Commission should act quickly.

Second, USWC requests that the Commission grant a pending Application for Review of recent staff letters holding that leases of excess ITFS capacity may not include a provision making the lease binding on the ITFS licensee's successor or assigns.¹⁹ The staff decisions follow the Commission decision in Central Cass Public School District, which held that such a provision tying the lease to the license "places an unreasonable impediment on the assignment or transfer of the ITFS facility."²⁰ The Application for Review questions that holding, arguing that it is an unexplained departure from previous decisions and will impair the ability of wireless cable operators to use excess ITFS capacity in their wireless systems.²¹ NYNEX agrees with USWC's position and urges the Commission to reverse its holding in Central Cass.²² Simply put,

¹⁹ USWC at p. 4 and Exhibit A (consisting of the Application for Review on behalf of Harlem Consolidated School District #122 and Victoria Independent School District).

²⁰ 10 FCC Rcd 3167, 3168 (1995).

²¹ See Exhibit A to USWC, *supra* at pp. 4-5.

²² NYNEX recognizes that the procedural posture of USWC's request is somewhat anomalous in that USWC is, in this rule making proceeding, requesting the Commission to act on an Application for Review in separate adjudicatory proceedings. However, the issue of whether holders of BTA authorizations have a reasonable assurance that they will be able to use excess ITFS capacity in their

that holding denies wireless cable operators the reasonable assurance they need that they will be able to use the excess ITFS cable capacity for the term of the lease. As a result, the holding is inconsistent with the Commission's efforts to promote wireless cable²³ and its recognition that excess ITFS capacity is vital if wireless cable systems are to secure the channel capacity they require to compete effectively with wired cable systems.

However, under the holding in Central Cass, the ITFS licensee need only assign the license to another qualified educational entity to take vital channel capacity away from the wireless cable operator. The uncertainty thus created can impair the ability of the wireless cable operator to secure financing and deter its willingness to make the financial commitment necessary to launch a wireless cable venture.

These very considerations moved the Commission in its Report and Order in MM Docket No. 93-24, supra, to relax its rule restricting the permissible term of excess capacity leases to the ITFS license term. In that decision, it decided to allow ITFS

BTAs is germane and relevant to this proceeding, and, as shown in the text, the holding in Central Cass can undermine the FCC's goal here "to facilitate the development and rapid deployment of wireless cable."

²³ See, Second Order on Reconsideration in Gen. Docket Nos. 90-54, 80-113, 18 (1995) ("A stated goal for this proceeding was to revise the MDS technical rule to maximize the service capabilities of MDS operators In the Wireless Cable Order, we reiterated that one goal of the providers is to "enhance the viability of wireless cable service and its stature as a competitive force in the multichannel video delivery marketplace. 5 FCC Rcd, 6410, 6411 (1990)." See also, Report and Order in MM Docket No. 93-24, 10 FCC Rcd. 2907 (1995); Reorganization of Multipoint and Multichannel Multipoint Distribution Service, 9 FCC Rcd. 3661 (1994); Second Report and Order in Gen. Docket No. 90-54, 6 FCC 6792 (1991), recon. denied, 7 FCC Rcd 5648 (1992); Report and Order in Gen. Docket No. 112 and CC Docket No. 80-116, 94 FCC 2d 1203 (1983).

licensees to enter into ten-year leases, subject to the grant of a renewal of its ITFS license.

The Commission stated:

We are mindful that the wireless cable industry requires substantial equity investment in order to become a viable competitor in the video marketplace. We also realize that a potential financier is likely to exercise caution before investing in an MDS system, where there is uncertain long-term availability of the ITFS channels that provide the basic capacity for that system Authorizing lease agreements that extend beyond the end of the license term would reduce the anxiety of potential investors that the MDS entity would shortly lose four channels, crippling the entire system The increased confidence of investors will significantly accelerate the development of the wireless cable industry and provide competition to wired cable.²⁴

The same rationale applies here with equal, if not greater, force. Indeed, the holding in Central Cass will undermine, if not obliterate, any benefit that might be derived from a ten-year lease. For, under Central Cass, the lease is only good as long as the current ITFS licensee remains the licensee.

Finally, the holding in Central Cass does not unduly impede the ability of the ITFS licensee to assign its license. Many, if not most, of the long-term agreements an ITFS licensee enters into will be binding on its successors and assigns. These include the lease of space for the transmitter, the lease of antenna tower space or the ground lease for the tower, any financing agreements entered into for equipment owned by the ITFS licensee, programming contracts the ITFS licensee may have entered into for its instructional programming, etc. The lease of excess capacity is no different.²⁵

²⁴ Report and Order in MM Docket No. 93-24, supra, at para 38.

²⁵ The existence of the excess capacity lease will affect the price the ITFS licensee may obtain for its facilities and for the assignment of the license, but that is no reason to preclude a provision requiring

III. The Commission Is Authorized to Use Auctions to Award MMDS Authorizations on a BTA Basis

A/B Financial, Inc. and Betty Brown (“A/B Financial”) make a lengthy and novel claim that the Commission is not authorized by Section 309(j) to use an auction to award BTA authorizations because the BTA authorization is not a “license.”²⁶ The argument is ingenuous, but meritless.²⁷

It is well established that the Commission has broad discretion to structure its procedural rules and to determine how best to implement a congressional directive.²⁸ While Section 309(j) is written in terms of using auctions for the award of licenses or construction permits, there is nothing in the language of the Section or its legislative history which indicates that Congress intended to straight-jacket the Commission to the use of auctions for “licenses and construction permits” as they have historically been known and to preclude it from designing auctions rules in a manner that accommodate the exigencies obtaining with respect to the service for which the auction will be employed.

the lease to follow the license. The value of ITFS assets were derived by virtue of the financial arrangements pursuant to which they were constructed and developed. Allowing the ITFS licensee to sell its facilities without the lease obligation, however, would result in an untoward financial benefit. In effect, the ITFS licensee would enjoy the benefits provided by the wireless cable operator’s financial contribution to construct and launch its system, and then pretermittting the wireless cable operator’s ability to achieve the benefits of its contribution.

²⁶ A/B Financial also argues that the BTA structure does not further the goals set forth in Section 309(j). Those claims are meritless on their face.

²⁷ A/B Financial apparently did not make this argument in response to the Commission’s Notice of Proposed Rule Making in this proceeding and has not made the showing required under Section 1.429(b) of the Commission’s rules in order to raise new matter in a Petition for Reconsideration.

²⁸ TRT Communications Corp. v. FCC, 876 F.2d 134 (D.C. Cir. 1989).

To the contrary, by expressly delegating to the Commission the responsibility for developing the design of auctions and charging it with exploring alternative auction structures and approaches.²⁹ Congress manifestly did not intend to delimit the Commission's power in the manner A/B Financial suggests. Rather, the grant of those powers and responsibilities evidence a congressional intention to give the Commission great flexibility to develop auction structures that would promote the objectives set forth in the Section.

The Commission approach here is a fully consistent with that charge (i.e., the existence of a large number of existing authorizations and grandfather ITFS facilities required the Commission to adopt an approach which established a defined authorization on which bids could be accepted, but which protected the existing interests). The Commission's use of a wide area authorization, similar to the authorizations granted broadband PCS applicants,³⁰ permits the use of auctions for deciding between competing applicants. Requiring applicants to specify the facilities they would request in order to obtain a construction permit and license recognizes the need for concrete applications to protect the interests of existing operators.

²⁹ See, Section 309 (j) (3) & (4). See also H. Rep. No. 103-111, 103 Cong., 1st Sess. 254, reprinted at 1993 U.S. Code Cong. & Admin News at 581.

³⁰ Contrary to A/B Financial's assertion, it is far from clear that the BTA Authorization is not a license within the meaning of Sections 308 and 309. As is the case with PCS authorizations, the BTA Authorization grants the holder the exclusive right to use spectrum in a defined geographic area.

The auction design is thus appropriately crafted to address the unique situation obtaining in the MDS world and nothing in Section 309(j) precludes the Commission from engaging in this kind of creative solution to a specific regulatory problem. A/B Financial's arguments would deny the Commission this flexibility without any support in the language or the legislative history of Section 309(j).³¹

IV. CONCLUSION

NYNEX urges that the Petitions For Reconsideration of the MDS Auction Order filed by WCAI, Pacific Telesis, Bell Atlantic and USWC should be granted, and the Petitions of John D. Pellegrin, Chtd., and A/B Financial should be denied, to the extent discussed herein. NYNEX further urges the Commission to act expeditiously on all

³¹ The vacuity of A/B Financial's claim is demonstrated by considering Bell Atlantic's suggestion that the Commission eliminate the requirement that specific applications be filed for MDS facilities, discussed supra. Under Bell Atlantic's proposal, BRTA holders would be free to construct anywhere in the BTA as long as they did not cause interference. They would only be required to file notices with the Commission identifying the facilities to be constructed. Under that approach, the BTA Authorization would, in fact, become a license or construction permit and would clearly fall within the literal language of Section 309(j). A different result should not obtain because the Commission has adopted a more cautious approach and required BTA holders to file applications specifying their requested facilities before commencing construction.

Petitions in order to clarify the terms and conditions under which MDS authority will be made available for bid in November 1995 and for future operations thereafter.

Respectfully submitted,

NYNEX Corporation

By: /s/ Donald C. Rowe

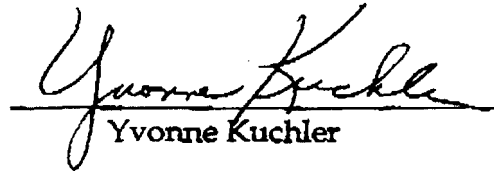
Donald C. Rowe
1111 Westchester Avenue
White Plains, NY 10604
(914) 644-6993

Its Attorney

Dated: September 13, 1995

CERTIFICATE OF SERVICE

I, Yvonne Kuchler, hereby certify that on September 13, 1995, a copy of the foregoing NYNEX Comments Re Petitions For Reconsideration in MM Docket No. 94-131 and PP Docket No. 93-253 was served on each of the parties listed on the attached Service List by first class U.S. mail, postage prepaid.


Yvonne Kuchler

Paul J. Sinderbrand, Esq.
Dawn G. Alexander, Esq.
William W. Huber, Esq.
SINDERBRAND & ALEXANDER
Attorneys for WCAI, Inc.
888 Sixteenth Street, NW
Fifth Floor
Washington, DC 20006-4103

Benjamin Perez, Esq.
Attorney for HITN, Inc.
1801 Columbia Rd., NW
Suite 101
Washington, DC 20009

John T. Scott, III, Esq.
William D. Wallace, Esq.
CROWELL & MORING
Attorneys for Bell Atlantic Corp.
1001 Pennsylvania Avenue, NW
Washington, DC 20004

James A. Stenger, Esq.
ROSS & HARDIES
Attorney for Harlem Consolidated S.D. #122, et al.
888 16th Street, NW
Suite 400
Washington, DC 20006

John D. Pellegrin, Esq.
Robert E. Kelly, Esq.
Attorneys for A/B Financial, Inc. et al.
1140 Connecticut Avenue, NW
Suite 606
Washington, DC 20036

Mr. John B. Schwartz
INSTRUCTIONAL TELECOMMUNICATIONS
FOUNDATION, INC.
P. O. Box 6060
Boulder, CO 80306

Todd D. Gray, Esq.
Margaret L. Miller, Esq.
Patricia I. Folan, Esq.
DOW, LOHNES & ALBERTSON
1255 Twenty-third Street, NW
Suite 500
Washington, DC 20037

Wayne Coy, Jr., Esq.
COHN & MARKS
Attorney for National ITFS Association
1333 New Hampshire Avenue, NW
Suite 600
Washington, DC 20036-4836

Jonathan D. Blake, Esq.
Lee J. Tiedrich, Esq.
COVINGTON & BURLING
Attorneys for CCWI and Pacific Telesis
P.O. Box 7566
1201 Pennsylvania Avenue
Washington, DC 20004

Mr. Thomas A. Pyle
NETWORK FOR INSTURCTIONAL TV, INC.
11490 Commerce Park Drive
Suite 110
Reston, Va 22091

Thomas J. Dougherty, Jr., Esq.
GARDNER, CARTON & DOUGLAS
Attorney for American Telecasting, Inc.
1301 K Street, NW
Suite 900 East Tower
Washington, DC 20005